IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 226 OF 2003
WITH
CIVIL APPLICATION NO. 328 OF 2003

Sou. Nirmala Vilas Pawar and ors. ..Appellants

Vs.

Sharad Shankar Garge ..Respondent

Mr. V.Z. Kankaria i/by Mr. S.R. Waghmare for appellants.
Mr. Kishore Patil i/by Mr. P.N. Joshi for respondent.

WITH
SECOND APPEAL NO. 287 OF 2003

Sou. Nirmala Vilas Pawar ..Appellant

Vs.

Baburao Rajaram Pawar and ors. ..Respondents

Mr. V.Z. Kankaria for appellant.
Mr. Kishore Patil i/by Mr. P.N. Joshi for respondent no.3.

CORAM: B.H. MARLAPALLE, J.

Date : April 18, 2007.

P.C.:

1. These two second appeals arise from the common judgment of the Lower Appellate Court in Civil Appeal

Nos. 267 of 2001 and 268 of 2001 and hence they are being disposed by a common order.

2. Regular Civil Suit No. 738 of 1997 was filed by the present appellant no.1 against the appellant no.2 as defendant no.1 and the respondent nos.1 to 3 as defendant nos.2 to 4. The relief sought for was permanent injunction against the defendants in respect of the suit property bearing No.4169 Sardar Chowk, Panchvati, Nasik and owned by defendant no.2 and out of the same plot, area admeasuring 70 x 25 ft. was given to defendant no.1 - Baburao Pawar on rent since last 40 years. Regular Civil Suit No. 34 of 1998 was filed by the present appellants jointly against the respondent no.1 - Sharad Garge for declaration and injunction in respect of the very same property which was covered by Regular Civil Suit No. 738 of 1997. The landlord had also filed eviction proceedings in Regular Civil Suit No.748 of 1997 against the present appellant no.1 and her husband Vilas for injunction. In all these three suits, the parties led common evidence in Regular Civil Suit No. 34 of 1998 and the oral evidence consisted of the depositions of the present appellants and Vilas, landlord Sharad Garge,

his brother Narayan Garge and Madhav Biwalkar (attesting witness of possession receipt) and Notary Advocate Jaiprakash B. Kasliwal as well as Arun Jadhav. The trial court was pleased to dismiss Regular Civil Suit No. 738 of 1997 filed by the appellant no.1 and Regular Civil Suit No. 34 of 1998 filed by the present appellants jointly was also dismissed. In both these suits the landlord had filed counter claims and the counter claims were decreed. Regular Civil Suit No. 748 of 1997 filed by the landlord and co-owners for injunction against the appellant no.1 and her husband came to be dismissed on the ground that admittedly the possession of the suit plot was with the appellants and, therefore, the suit for injunction filed by the landlord was not tenable. It was not known whether the landlord had filed any appeal against the dismissal of Regular Civil Suit No. 748 of 1997 and perhaps having been satisfied by the counter claim decrees, he did not choose to file such an appeal. The Lower Appellate Court by its common judgment and order confirmed the decrees passed by the trial court in Regular Civil Suit No. 738 of 1997 and Regular Civil Suit No.34 of 1998, in favour of the landlord.

3. The plaintiff in Regular Civil Suit No. 738 of 1997 had claimed that the suit plot was in possession of the defendant no.1 therein for about 40 years and he was the tenant of defendant no.2. He was running his business by name "Samadhan Raspan Griha and the same was transferred in her favour by an agreement dated 17/3/1993 by defendant no.1 who is her father-in-law. She further claimed that the other family members i.e. two sons of defendant no.1 (defendant nos.2 and 3) had relinquished their right in the said business in her favour and consequently she was in exclusive possession of the suit plot right from March, 1993. She further alleged that the defendants were causing obstruction over her possession. On the other hand, defendant no.4 - the landlord filed his Written Statement and opposed the suit by stating that defendant no.1 had handed over the possession of the suit property to him by way of possession Pawati dated 18/8/1997 and the plaintiff and her husband had taken forcible possession of the suit property from him. The contentions of the plaintiff have been discarded and it has been held that the landlord proved to have received the

possession of the suit property from defendant no.1 and the plaintiff and her husband had taken forcible possession of the suit property. It was further held that in view of the provisions of the Bombay Rent Act, the agreement dated 17/3/1993 was illegal. The suit was dismissed by allowing the counter claim of defendant no.4 in the following terms:-

> "The plaintiff shall hand over the vacant possession of the suit property to defendant no.4 - Sharad Garge within 3 (three) months from today."

4. In Regular Civil Suit No. 34 of 1998, the trial court held that the Kabje Pawati dated 18/8/1997 was held to be valid and legal and binding on both the plaintiffs. It was further held that the possession of the plaintiff over the suit property was that of trespasser and that the plaintiffs were not entitled for the relief they prayed for. Consequently, the counter claim of the landlord was allowed in the following terms:-

> "(a) It is hereby declared that the possession

receipt dated 18/8/1997 vide exh.33 is legal.

(b) The plaintiffs are hereby directed to hand over the vacant possession of the suit property to the defendant within 3 (three) months from today".

. Thus the claim of the plaintiff Nirmala was required to be examined vis-a-vis the Kabje Pawati dated 18/8/1997 (Exh.33) signed by her father-in-law Baburao surrendering the suit premises to the landlord and whether the possession over the suit property of Nirmala and Baburao was as a trespasser. The third issue is regarding the jurisdiction of the court to entertain the counter claim for possession of the suit property as made by the landlord and whether the landlord was entitled for such a possession. Mr. Kankaria the learned counsel, firstly, contended that in RCS No. 738 of 1997 the father-in-law was impleaded as defendant no.1 and was represented by the same lawyer that of the landlord and the father-in-law having received the court summons got annoyed and in this anger he signed the Kabje Pawati and it could not be treated to be a genuine document. So far as the

Advocate is concerned, it is noted that when RCS No.34 of 1998 was filed and the landlord decided to file counter claim, the landlord's Advocate Pujari withdrew himself for the defendant no.1 in RCS No.738 of 1997. In support of the Kabje Pawati, there is evidence of Notary Shri Kasliwal before whom the possession receipt was registered and the said evidence was supported by the register maintained by him. He stated before the trial court that Baburao, Pathak and other persons had gone to him on 18/8/1997 for registration of the receipt. He had read over the contents of the said document to Baburao as Baburao was illiterate and thereafter when Baburao admitted the contents to be correct, he notarised the Kabje Pawati and Baburao had made thumb impression on the same. An endorsement to that effect was also made on the possession receipt in his hand writing and he made entry of the document in the register at page 163, Sr.No.163-A. On this register also he obtained thumb impression of Baburao which was attested by Pathak and said entry was at Exh.81. There was another witness Arun Jadhav, an Advocate who had sold the stamp paper for execution of the Kabje Pawati. The stamp paper was sold to Baburao Pawar through the hands of Muktar

Shaikh. There is one more witness, namely, Narayan the eldest brother of the landlord Sharad. He stated that Sharad had told him to withdraw an amount of Rs.31,000/- so as to hand over to Baburao in lieu of the possession of the suit plot and, therefore, he went to Janalaxmi Bank on 18/8/1997 and withdrew the amount. Thereafter he went to the office of Advocate Kasliwal. In the office of Advocate Kasliwal, the landlord, Baburao as well as witness Biwalkar and Pathak were present. He gave the amount to Sharad, who then handed over the said amount to Biwalkar. Withdrawal entry at Exh.63 and income tax return entry at Exhs.75, 77 and 78 clearly went to show that the amount of Rs.31,000/- was paid by the landlord to Baburao towards surrender of premises, as has been held by both the courts below. Thus, the Kabje Pawati at Exh.33 was a document which was a genuine document and was duly proved, not only by the evidence of Baburao but also by the evidence of other witnesses as named hereinabove.

5. Now coming to the agreement dated 17/3/1993 (Exh.32) on the basis of which plaintiff Nirmala claimed to be a tenant over the suit plot. This is an

agreement between Nirmala and Baburao and for a consideration of Rs.25,000/-. Baburao had no authority to sublet the suit plot and subletting itself is a ground for eviction under Section 13(1)(e) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The landlord had no knowledge about this transaction between Nirmala and Baburao. This was the sole document on the basis of which Nirmala claimed her title over the suit plot on the basis of the so called family partition. In her cross-examination Nirmala could not prove the theory of partition, as a result of which the document at Exh.32 was signed. She also admitted that the document was not registered with the Sub Registrar's office. She also admitted that the licence for the Samadhan Raspan Griha was standing in the name of her mother-in-law till her demise and subsequently transferred in the name of her father-in-law. Thus from the year 1993 till the year 1997, the licence was not in her name. This transfer deed at Exh.32 was claimed to be effected in pursuance of the oral partition arrived amongst the family members of Baburao. The contents of the transfer deed were totally different from the case which was made out by

Nirmala in her depositions. Neither the transfer deed was acted upon nor was the oral partition and the payment of Rs.25,000/- to Baburao. It was under these circumstances, the courts below have held that the document at Exh.32 could not be treated to be a legal document transferring tenancy rights in the suit premises by a tenant in favour of some third person. Thus, Baburao, in law, continued to be the tenant till he signed the Kabje Pawati at Exh.33 in respect of the suit plot and it surrendered by Baburao in favour of the landlord was duly proved.

6. There is one more aspect which also needs to be considered and i.e. plot size. The suit property bearing No.4169 situated in Sardar Chowk, Panchvati is owned by Sharad Garge and plot area admeasuring 40 x 25 ft. was given to Baburao on rent and he was running his business of sugar-cane juice (Samadhan Raspan Griha), whereas Nirmala claimed the suit plot area as 70 x 25 ft. The rent receipts at Exhs. 59, 61 and 62 were on record and they do not speak of the plot area as 70 x 25 ft. Once Baburao himself had surrendered the suit plot to the landlord, there was no question of the landlord causing obstruction and,

therefore, there was no case made out for a permanent injunction. Consequently, the landlord's counter claim has been allowed. Mr.Kankaria the learned counsel submitted that the counter claim was hopelessly time barred. The counter claim (Exh.17) in RCS No. 34 of 1998 was made on 6/2/1999, whereas in RCS No. 738 of 1997 such a counter claim (Exh.31) was made on 29/6/1998. The Kabje Pawati is dated 18/8/1997 (Exh.33) and, therefore, by no stretch of imagination it could be said that the counter claim is hit by limitation.

7. It is, therefore, evident that both the courts below rightly dismissed the suits filed by Nirmala and allowed the counter claim made by the landlord. The decree of eviction is definitely on the ground of not only the Kabje Pawati (Exh.33), but also on the ground that the tenant Baburao Pawar had illegally handed over the possession of the suit plot to his daughter-in-law Nirmala by the agreement at Exh.32. Nirmala had no title over the suit plot and, therefore, she was rightly treated as a trespasser and was directed to be evicted.

8. These second appeals do not raise any questions of law and, therefore, they must fail at the threshold. Both the appeals are dismissed in limine.

9. Civil Application No. 328 of 2003 in Second Appeal No. 226 of 2003 does not survive and the same shall stand disposed as such.

(B.H. Marlapalle,J.)